Nos. 93-1408, 93-1414 and 93-1415

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NEW YORK STATE CONFERENCE OF BLUE CROSS & BLUE SHIELD PLANS, *et al.*,
Petitioners
v.
TRAVELERS INSURANCE CO., *et al.*

MARIO M. CUOMO, GOVERNOR OF NEW YORK, *et al.*,
Petitioners
v.
TRAVELERS INSURANCE COMPANY, *et al.*

HOSPITAL ASSOCIATION OF NEW YORK STATE,
Petitioner
v.
TRAVELERS INSURANCE COMPANY, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL CARRIERS' CONFERENCE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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ISSUE PRESENTED

We devote this brief to an issue upon which the Court granted *certiorari* but that neither petitioners nor the United States as *amicus curiae* have briefed. That issue is whether New York's 13% surcharge upon all hospital bills paid by, *inter alia*, self-insured plans and plans insured by commercial insurers, but not upon bills paid by plans insured by the Blues, is preempted by § 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), as to self-insured ERISA plans, as distinct from commercially insured ERISA plans.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE QUESTION OF WHETHER OR NOT ERISA PREEMPTS APPLICATION OF NEW YORK'S 13% SURCHARGE TO SELF-INSURED ERISA PLANS IS PROPERLY BEFORE THE COURT AND SHOULD BE DECIDED	8
II. SECTION 514(a) OF ERISA PREEMPTS APPLICATION OF NEW YORK'S 13% SURCHARGE TO SELF-INSURED ERISA PLANS	13
A. The "Relates to" Clause	13
B. The "Saving" and "Deemer" Clauses	23
CONCLUSION	25
APPENDIX AND EXHIBITS THERETO	
Citations to the Record in the Lower Courts	1a
Travelers' Notice of Motion for Summary Judgment (filed Aug. 21, 1992) Exhibit 1	9a
HIAA Plaintiffs' Notice of Motion (filed Aug. 21, 1992) Exhibit 2	11a
Letter from Craig P. Murphy, Counsel for Travelers, to Hon. Louis J. Freeh (Mar. 24, 1993) Exhibit 3	14a
Letter from Robert A. Bicks, Counsel for Blue Cross/Blue Shield, to Hon. Louis J. Freeh (Mar. 29, 1993) Exhibit 4	17a

TABLE OF CONTENTS—Continued

	Page
Letter from Jeffrey J. Sherrin, Counsel for HANYS, to Hon. Louis J. Freeh (Mar. 30, 1993) Exhibit 5	20a
Letter from Craig P. Murphy, Counsel for Travelers, to Hon. Louis J. Freeh (Mar. 31, 1993) Exhibit 6	23a
Letter from Benjamin W. Boley, Counsel for NCCC, to Hon. Louis J. Freeh (Apr. 6, 1993) Exhibit 7	25a
Order, Dkt. Nos. 92 Civ. 3999, 92 Civ. 5419 (S.D.N.Y. Apr. 27, 1993) Exhibit 8	29a
Affidavit of Jeffrey J. Sherrin, Counsel for HANYS, in Opposition to Motion of NCCC for Leave to File Brief as *Amicus Curiae*, Dkt. Nos. 93-7132L, 93-7134CON, 93-7148CON, 93-7194XAP (2d Cir.) (sworn to Apr. 21, 1993) Exhibit 9	32a

TABLE OF AUTHORITIES

CASES	Page
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)	16, 21, 22
Auto Club Ins. Ass'n v. *Health and Welfare Plans, Inc.*, 961 F.2d 588 (6th Cir. 1992)	16
Baxter v. *Lynn*, 886 F.2d 182 (8th Cir.), *reh'g denied, en banc*, 1989 U.S. App. LEXIS 16899 (8th Cir. 1989)	17
Brown v. *Granatelli*, 897 F.2d 1351 (5th Cir.), *cert. denied*, 498 U.S. 848 (1990)	16
District of Columbia v. *Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992)	14, 15, 16
Electro-Mechanical Corp. v. *Ogan*, 9 F.3d 445 (6th Cir. 1993)	24
FMC Corp. v. *Holliday*, 498 U.S. 52 (1990)	9, 16, 24
Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987)	16
Hampton Indus., Inc. v. *Sparrow*, 981 F.2d 726 (4th Cir. 1992)	24
Ingersoll-Rand Co. v. *McClendon*, 498 U.S. 133 (1990)	16, 21
Mackey v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988)	14, 16
Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U.S. 724 (1985)	16, 18, 19, 23, 24
Mullenix v. *Aetna Life and Casualty Ins. Co.*, 912 F.2d 1406 (11th Cir. 1990)	16
National Elevator Indus., Inc. v. *Calhoon*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992)	22, 23
NYSA-ILA Medical and Clinical Servs. Fund v. *Axelrod*, 27 F.3d 823 (2d Cir.), *petition for cert. filed sub nom. Chassin* v. *NYSA-ILA Medical and Clinical Servs. Fund*, 63 U.S.L.W. 3429 (U.S. Oct. 21, 1994) (No. 94-745)	11
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987)	14
PPG Indus. Pension Plan A (CIO) v. *Crews*, 902 F.2d 1148 (4th Cir. 1990)	17, 21
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983)	15, 21

TABLE OF AUTHORITIES—Continued

	Page
Travitz v. *Northeast Dep't ILGWU Health and Welfare Fund*, 13 F.3d 704 (3d Cir.), *cert. denied*, 114 S. Ct. 2165 (1994)	16, 24
Tri-State Machine, Inc. v. *Nationwide Life Ins. Co.*, 33 F.3d 309 (4th Cir. 1994)	24
United Wire, Metal and Machine Health and Welfare Fund v. *Morristown Memorial Hospital*, 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S. Ct. 382 (1993)	4, 11, 12, 17
STATUTES	
Employee Retirement Income Security Act of 1974 (ERISA):	
§ 3(1), 29 U.S.C. § 1002(1)	13
§ 3(21)(A), 29 U.S.C. § 1002(21)(A)	2
§ 503(2), 29 U.S.C. § 1133(2)	2
§ 514(a), 29 U.S.C. § 1144(a)	*passim*
§ 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A)	9, 13, 23
§ 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B)	18, 23
N.Y. Pub. Health Law	
§ 2807-c(1)(a) (McKinney Supp. 1993)	20
§ 2807-c(1)(b) (McKinney Supp. 1993)	2, 19
MISCELLANEOUS	
120 Cong. Rec. 29933 (1974)	21
120 Cong. Rec. 29942 (1974)	21

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BRIEF OF THE NATIONAL CARRIERS' CONFERENCE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The National Carriers' Conference Committee ("NCCC") submits this brief as *amicus curiae* urging affirmance of the decision of the court of appeals. Pursuant to Rule 37.3 of the Rules of this Court, the NCCC has filed with the Clerk the written consents of all of the parties in this case to the submission of this *amicus curiae* brief.

The NCCC, consisting of labor relations officials of ten of the nation's major freight railroads and the Chairman of the National Railway Labor Conference, is the sole governing body of fiduciaries for The Railroad Employees National Early Retirement Major Medical Benefit Plan. In addition, along with the Health and Welfare Committee of Cooperating Railway Labor Organizations, the NCCC serves as the governing body of fiduciaries for The Railroad Employees National Health and Welfare Plan. These Plans (the "Railroad Plans" or the "Plans") were established and are maintained pursuant to national collective bargaining agreements under the Railway Labor Act between most of the Class I line haul rail carriers in the United States and the principal twelve railway labor organizations. The Plans are self-insured employee welfare benefit plans under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). They provide health care benefits, including coverage for inpatient hospital care, to more than a half million railroad employees, retirees, and their dependents throughout the country. Respondent The Travelers Insurance Company ("Travelers") provides claims administrative services to the Railroad Plans and acts as a fiduciary of the Plans under §§ 3(21)(A) and 503(2) of ERISA, 29 U.S.C. §§ 1002(21)(A) and 1133(2).

In this case, the court of appeals affirmed the summary judgment of the district court that ERISA preempts the imposition of, among other things, a 13% surcharge under § 2807-c(1)(b) of the N.Y. Pub. Health Law on general hospital bills for inpatient care paid by ERISA-

covered plans, whether such plans are self-insured by the employers maintaining them or insured under a policy issued by a commercial insurer. Reversal of the court of appeals' decision would require the Railroad Plans either (a) to pay the 13% surcharge—approximately $1 million per year—so as to remain self-insured on a national basis as called for by the collective bargaining agreements pursuant to which the Plans are maintained and to continue to have the Plans administered on a national or regional basis by administrators of their choice, or (b) to avoid the 13% surcharge by becoming insured with Blue Cross/Blue Shield (the "Blues") in New York, thus destroying the interstate uniformity of the Plans' structure (self-insured) and administration (nationwide or regional) and subjecting the Plans to New York's host of insurance laws and regulations.

The interest of the NCCC, as fiduciaries of the Plans, is to escape this Hobson's choice.

SUMMARY OF ARGUMENT

I. This case presents two closely related questions: Does ERISA preempt New York's 13% surcharge on hospital bills for inpatient care as the surcharge is applied to ERISA-covered plans that are (a) insured by commercial insurers or (b) self-insured. We contend, contrary to the suggestion of the United States, that the question of ERISA preemption of the surcharge as applied to self-insured plans is properly before the Court and that sound judicial policy calls for its resolution in this case.

The issue of whether ERISA preempts application of the surcharge to self-insured plans has been raised, argued before and decided by both the district court and the court of appeals. Plaintiffs, acting as claims fiduciaries for self-insured plans, raised the issue in their complaints and motions for summary judgment. The district court granted summary judgment in plaintiffs' favor in all respects as to the 13% surcharge, and the court's opinion shows that

the judgment included a declaration that ERISA preempted the surcharge as applied to self-insured plans. Indeed, following the entry of a stay of its judgment on the 13% surcharge pending appeal, the district court ordered the plaintiffs who are claims fiduciaries for self-insured plans to pay the surcharge on their behalf.

Appellants brought the issue regarding self-insured plans to the court of appeals both in their statements of questions presented and in their briefs. In fact, appellant Hospital Association of New York ("HANYS") unsuccessfully opposed the motion of this *amicus* for leave to file a brief in the court of appeals on the ground that the appellees who are claims fiduciaries for self-insured ERISA plans had adequately represented the interests of those plans. The court of appeals affirmed the district court's ruling as to the 13% surcharge in all respects. That the court's opinion did not distinguish between insured and self-insured plans is without consequence, since its ruling found preemption as to both.

All of the petitioners in this Court based their argument for *certiorari* on an alleged conflict between the decision below and the decision of the Third Circuit Court of Appeals in *United Wire, Metal and Machine Health and Welfare Fund* v. *Morristown Memorial Hospital*, 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S. Ct. 382 (1993), where *only* self-insured plans and their participants challenged various New Jersey hospital rate laws on ERISA preemption grounds. Indeed, the *certiorari* petition of HANYS explicitly framed the issue in terms of whether ERISA preempted New York's different "set of [hospital] rates for patients covered by[, among others,] self-insured plans." Brief for Petitioner HANYS on Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit at (i); *HANYS* v. *Travelers Ins. Co.*, Dkt. No. 93-1415, 63 U.S.L.W. 3282, 3291 (U.S. Oct. 7, 1994).

This Court should decide the issue of preemption as to self-insured plans because it is inextricably linked to the

issue of preemption as to insured plans. In both contexts, the impact of the 13% surcharge on a plan's choice of insurers must be evaluated. The preemption issue as to self-insured plans raises two additional, but related, considerations: imposition of the surcharge directly upon an ERISA plan and its effect on a plan's choice of a basic structure, *i.e.*, insurance versus self-insurance. Moreover, the Court should decide the question of preemption of the 13% surcharge as it applies to self-insured plans because that question was the very issue creating the conflict petitioners cited in seeking *certiorari*.

II. The 13% surcharge as applied to self-insured ERISA plans "relates to" them for purposes of ERISA's preemption provision because (a) self-insured plans themselves pay the surcharge to the hospitals—there is no intervening insurance company that pays the hospital and passes the surcharge through to the plans in the form of higher premiums—and (b) the surcharge applies to self-insured plans solely by virtue of the central function that makes them ERISA-covered plans—the payment of health care benefits. This particular characteristic of the surcharge distinguishes it from state laws imposing directly upon self-insured plans requirements affecting the plans by reason of their property ownership, utility use, hiring of employees and other similar activities.

In addition, the surcharge "relates to" the self-insured plans because it is designed to induce them to alter drastically their basic structure and administration by changing from self-insurance administered on a national or multistate regional basis by entities of their choice to insurance with the Blues in New York. Such a change would create severe administrative burdens for such plans and subject them to New York insurance laws and regulations from which Congress, in the "deemer" clause of ERISA's preemption provision, expressly protected them. Furthermore, becoming insured with the Blues in New York would interfere with the uniform plan structure and

administration throughout the country or multistate region that is the hallmark of interstate plan operations, especially those of national plans that are collectively bargained, as are the Railroad Plans.

The insurance "saving" clause of ERISA's preemption provision does not preserve the 13% surcharge from preemption. The surcharge is a law regulating hospital rates, not insurance. Furthermore, the deemer clause of the preemption provision precludes application of the saving clause to any state law to the extent that it "relates to" self-insured plans. Thus, since the 13% surcharge "relates to" self-insured plans, the saving clause does not insulate the surcharge from preemption as it applies to them.

ARGUMENT

New York's effort to improve the competitive position of the Blues by imposing a 13% surcharge on other payors of inpatient hospital bills penalizes both commercially insured and self-insured plans. In the case of insured ERISA plans, the impact of the surcharge comes by way of premium increases by the insurers. In the case of self-insured ERISA plans, the impact is direct and immediate. The surcharge is paid to the hospitals by the plans themselves. Though the aim of the statute is the same in both situations—to induce plans to switch to the Blues "by giving the Blues a competitive advantage over commercially insured, self-insured funds" and others (Pet. App. at 27, 56)[1]—and while in our view a statute so designed runs afoul of ERISA's preemption provision whether applied to commercial insurers or to self-insured plans, the situations are not identical. As the United States acknowledges: "Application of the 13% surcharge

[1] We adopt "Pet. App." to refer to the Petitioners' Appendix to their petition for *certiorari* in Docket No. 93-1414 and "JA" to refer to the Joint Appendix filed by Petitioners with their briefs on the writ.

to 'self-insured funds' may raise some distinct issues, since that surcharge applies to bills that some ERISA plans—those that self-insure—must pay themselves." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 12 n.3 (hereinafter "Gov't Br."); Brief for the United States as *Amicus Curiae* on Petitions for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit at 14 n.5 (hereinafter "Gov't Br. on Pet.").

The United States thus appears to appreciate that the argument that the 13% surcharge "relates to" ERISA plans is stronger where the surcharge is levied upon the plan itself than where the surcharge impacts the plan through the intermediary of an insurer. Moreover, in the case of self-insured plans, there is an additional distinguishing factor relating to the plan's basic structure and administration. Not only does the statute designedly color the plan's choice of insurance carrier, but it also affects the choice of insurance as against self-insurance.

In view of the interrelationship of the issues respecting insured and self-insured ERISA plans—both their similarities and dissimilarities—it would on the face of it seem desirable for the Court to examine them together. Nevertheless, petitioners do not discuss the discrete problems raised by application of the surcharge to self-insured plans, and the Government expressly declines to brief the question, resting on its suggestion that the Court remand that issue to the lower courts if it reverses the court of appeals respecting exaction of the surcharge from commercially insured ERISA plans. Gov't Br. at 12 n.3, 28 n.20.

In this brief, we show, first, that the Government's recommendation is grounded in a demonstrably mistaken understanding of the proceedings below and, to the extent it speaks to the Court's discretion, is unwise. We then show that application of the surcharge to self-insured ERISA plans is barred by ERISA's preemption provision.

I. THE QUESTION OF WHETHER OR NOT ERISA PREEMPTS APPLICATION OF NEW YORK'S 13% SURCHARGE TO SELF-INSURED ERISA PLANS IS PROPERLY BEFORE THE COURT AND SHOULD BE DECIDED.

Notwithstanding the Solicitor General's expressed doubts, the issue of preemption of the surcharge as applied to self-insured ERISA plans was unquestionably raised, argued, and decided both in the district court and the court of appeals and was one of the issues as to which this Court granted *certiorari*. Because of the importance of this question and the irreconcilability between our view of the lower court proceedings and the Solicitor General's, we include in the Appendix ("App.") detailed citations to the record in the lower courts. In summary, that record shows the following:

The issue of preemption respecting self-insured plans was raised in the district court by the plaintiffs as fiduciaries for such plans. While the Government, in its Brief as *Amicus Curiae* in support of the petition for *certiorari*, maintained the contrary (Gov't Br. on Pet. at 14 n.5), it now acknowledges, though rather elliptically, its error.[2] Gov't Br. at 11-12 n.3. As to the proceedings before the district court, the affidavits from the plaintiffs in support of their motions for summary judgment were replete with references to self-insured plans, App. at 2a, and the district court granted those motions in all respects pertaining to the 13% surcharge. Pet. App. at 89-90. Moreover, the court in its opinion made quite clear that

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[2] It now says, "In fact, the complaints filed in this case may be read to allege that one or more of the plaintiffs is a self-insured plan, see J.A. 93, at ¶ 18, and the complaints allege that several of the insured-[sic] plaintiffs in this case are fiduciaries for self-insured funds that are ERISA plans, see J.A. 69, 91-93." Gov't Br. at 12 n.3. To say that parties alleged standing to raise an issue is not quite the same thing as to concede that they did in fact raise the issue. But since in fact they did, this seems close enough to be taken as a concession.

its judgment applied to self-insured plans. Thus, the court specifically held, citing *FMC Corporation* v. *Holliday*, 498 U.S. 52 (1990), that the insurance saving clause of ERISA § 514(b)(2)(A) cannot save the surcharge *as applied to self-insured plans* because "self-insured plans do not engage in the 'business of insurance' as a matter of law." Pet. App. at 79.

The Solicitor General believes it is "not clear" that the district court's injunction—which was directed " 'against any commercial insurers or HMOs in connection with their coverage of any ERISA plans' "—extended to insurers in their capacity as administrators of self-insured plans. Gov't Br. at 12 n.3 (citation omitted). But it is the court's judgment that is controlling, and that judgment plainly extended to self-insured plans. In any event, the Solicitor General's doubt is unfounded. He evidently believes that the term "coverage" in the injunction might refer only to insured coverage. But the court held that HMOs are not engaged in the business of insurance (Pet. App. at 79 & n.14), and, accordingly, the court's use of the term "coverage" respecting both HMOs and commercial insurers must be taken to include coverage under self-insured plans that they administer.

Moreover, the court removed any possible question by squarely ruling, in a post-judgment order of which the Solicitor General may be unaware, that the court's judgment encompassed self-insured plans. After the court had stayed that judgment as to the 13% surcharge pending appeal, a dispute arose as to whether a plaintiff, Travelers, in its capacity as fiduciary for two self-insured ERISA plans that were not parties, the Railroad Plans, was obliged to pay the surcharge on their behalf. Noting that "two self-insured ERISA plans for which Travelers provides administrative services . . . had instructed Travelers not to pay the 13% differential," the court ordered Travelers to pay. App. at 4a-5a and Ex. 8 thereto.

As to the appeal, the Solicitor General says:

> "Since no cross-appeal was taken from the district court's order, the application of the 13% surcharge to 'self-insured fund[s]' was not raised by any party before the court of appeals. Nor did the court address it *sua sponte*." Gov't Br. at 12 n.3.

The Solicitor General is mistaken. (Not, to be sure, with respect to the absence of a cross-appeal regarding any surcharge. But this is a fact without any significance that we can discern, since the judgment on the surcharges was wholly in plaintiffs' favor.) The appeal carried to the court of appeals that judgment, which covered the 13% surcharge as applied to self-insured funds. The appellants' statements of questions presented embraced that issue. And it was briefed by the parties. (See App. at 5a-6a, especially the citations to passages in the appellants' briefs.) Of particular significance is the opposition of appellant—here petitioner—Hospital Association of New York State ("HANYS") to this *amicus*' motion, subsequently granted, for leave to file a brief with the court of appeals:

> "First, the Court already has been favored with briefs from five sets of parties and from four amicus curiae, covering all of the issues. *In particular, the interests of all self-insured plans, and the Railroad Plans specifically, are alrready represented.* Plaintiff the Travelers Insurance Company ('Travelers') acts as fiduciary or otherwise provides administrative services to self-insured plans, including the Railroad Plans. Travelers has specifically lodged its complaint in such capacity. (Citation omitted.) The additional brief which the Railroad Plans seek to submit is merely cumulative . . . ." (Emphasis added.) App. at 7a and Ex. 9 thereto.

Thus the issue as to self-insured plans was clearly in play in the court of appeals; and while the court did not in its opinion distinguish between self-insured plans and insured plans, there was no reason for it to do so. App.

at 8a. The court simply referred to the 13% surcharge in general terms without distinction as to payor—whether commercial insurer or self-insured plan—and if its rationale be thought to be framed primarily with reference to insured plans, that rationale surely applied *a fortiori* to self-insured plans. If anything can be said to be missing, it is simply the equivalent of an addendum stating that "the same is true of self-insured plans".[8]

In this Court, the petitioners sought review of the judgment below insofar as it struck down the 13% surcharge and did not, naturally, excise from their request that element of the judgment applying to self-insured plans. To the contrary, the first issue identified in the petition filed by HANYS expressly raised the question of preemption of New York's different "set of [hospital] rates for patients covered by[, among others,] self-insured plans," and the Court granted that petition as to that issue. Brief for Petitioner HANYS on Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit at (i); *HANYS* v. *Travelers Ins. Co.*, Dkt. No. 93-1415, 63 U.S.L.W. 3282, 3291 (U.S. Oct. 7, 1994). Moreover, the principal reason advanced by all petitioners for review was the asserted conflict between the decision below and that of the Third Circuit Court of Appeals in *United Wire, Metal and Machine Health and Welfare Fund* v. *Morristown Memorial Hospital*, 995 F.2d 1179 (3d Cir. 1993)—a case where *only self-insured plans and their participants* challenged various New Jersey hospital rate laws as preempted by ERISA.

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[8] If a full expression of the court of appeals' views respecting preemption as it applies to self-insured plans be thought helpful, the court supplied it in its subsequent opinion in *NYSA-ILA Medical and Clinical Services Fund* v. *Axelrod*, 27 F.3d 823 (2d Cir.), *petition for cert. filed sub nom. Chassin* v. *NYSA-ILA Medical and Clinical Services Fund*, 63 U.S.L.W. 3429 (U.S. Oct. 21, 1994) (No. 94-745).

In these circumstances, the Solicitor General's suggestion that the Court not decide the preemption issue as it relates to self-insured plans is without procedural warrant. It is also without merit as a matter of judicial policy. That issue is inextricably linked to the issue of preemption respecting insured plans. A central element of the preemption analysis respecting the surcharge's application to ERISA plans generally is the New York statute's purpose of influencing the plans' choice of insurers. That element must be evaluated as it relates to insured plans. It is even more pertinent in the context of self-insured plans, because that context includes two additional, but related, factors—the effect on the choice of a plan's basic structure, *i.e.*, self-insurance versus insurance, and the direct imposition of the surcharge on the plans. There is no sound reason for excluding self-insured plans from this assessment and leaving undecided the very question answered in *United Wire* that petitioners asserted created the conflict requiring resolution by this Court. This is especially so because, as we have noted *supra* at 11 n.3, that question was ruled upon by the Court of Appeals for the Second Circuit in a decision subsequent to the one here under review, a decision as to which a petition for *certiorari* is currently pending.

We add that it might be useful to the Court to be advised of the position of the United States respecting self-insured plans. In the court below, as the Solicitor General notes, the Secretary of Labor, appearing as *amicus curiae*, took the position "that the impact on choices made by plans provides a sufficient connection to trigger preemption" of the surcharges on the ground that they "relate to" ERISA plans, "but that—except for self-insured ERISA plans, which are protected by the 'deemer' clause—they are saved from preemption by the insurance savings clause." Gov't Br. at 14 n.4. The Secretary has now joined in the contrary position expressed in the brief for the United States with respect to insured plans, *id.* at 14 & n.4; but there is no indication that the United States

would extend that reversal of position to self-insured plans, which, the Solicitor General acknowledges, "may raise some distinct issues." *Id.* at 12 n.3.

II. SECTION 514(a) OF ERISA PREEMPTS APPLICATION OF NEW YORK'S 13% SURCHARGE TO SELF-INSURED ERISA PLANS.

New York's 13% surcharge as applied to self-insured ERISA plans "relates to" those plans for purposes of § 514(a) of ERISA, 29 U.S.C. § 1144(a), and, as applied to those plans, is not a law "which regulates insurance" under the saving clause of § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

A. The "Relates to" Clause.

The 13% surcharge imposed upon self-insured ERISA plans "relates to" them for purposes of § 514(a) because the surcharge is a *direct* levy upon such plans and attaches to the very activity that makes them ERISA-covered plans, the provision of health care benefits to plan participants. The plans pay the surcharge to the billing hospital; there is no intervening insurance company that pays the hospital and passes the surcharge on to the plans in the form of higher premiums.[4] And the provision of hospital care benefits to participants, the activity upon which the surcharge is fixed, is the very function that brings the plans, pursuant to § 3(1) of ERISA, 29 U.S.C. § 1002(1), under its coverage.

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[4] The distinction is not merely formal. When paid by ERISA plans in response to the hospital's bill, the amount is fixed by law. When passed through by a commercial insurer, the amount is determined by the realities of the competitive marketplace. Insurers must cover their costs or go out of business. Accordingly, substantial cost increases suffered by the insurer are almost certain to increase the costs of the insured plan. Still, the difference between a cost increase that the law requires a self-insured plan to pay and a cost increase that an insured plan is asked by its insurer to agree to pay is a real difference.

We submit that these facts, viewed against this Court's rulings that ERISA's preemption clause is to be accorded " 'its broad common-sense meaning,' " *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 47 (1987) (citations omitted), so as to give "effect to the 'deliberately expansive' language chosen by Congress," *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580, 583 (1992) (citation omitted), make inescapable the conclusion that New York's 13% surcharge "relates to" self-insured ERISA plans. As in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), the result is driven by the statutory language. To borrow and adapt the words of *amicus curiae* quoted by this Court in *Mackey* in applying the "relates to" phrase, " 'there is simply no logical way to construe the English language' " so as to conclude that a law imposing a 13% levy on bills paid by self-insured ERISA plans for inpatient hospital care of plan participants does not "relate to" such plans. *Mackey*, 486 U.S. at 836.

This is not to say that *any* tax or other requirement directly imposed upon an ERISA plan "relates to" that plan for purposes of § 514(a). Congress did not intend to wipe out a state's entire body of laws insofar as they apply to ERISA plans. As the Court observed in considering state judicial remedies in *Mackey*, no one would contend that "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are preempted. *Id.* at 833. But here, the 13% surcharge is not only imposed directly upon self-insured plans, *it is imposed solely by virtue of the core plan function that causes the plan to fall within ERISA's ambit, the provision of health care benefits to plan participants.*

On this analysis, the term "relates to" would retain the exceedingly broad meaning that Congress intended and that this Court has articulated. It would not be artificially constricted so as to avoid unreasonable results. Such results would be avoided, instead, through interpretation

of the phrase "any employee benefit plan"—to which the challenged state law must "relate"—so that that phrase does not simply describe one type of enterprise among others, but defines an entity that is affected by the state law *because it is a benefit plan* rather than something else. Laws that apply to ERISA plans, then, solely because they own property, or use utilities, or hire employees, or engage in other activities just as do myriad other enterprises, would not "relate to" those plans even though the laws impose requirements directly upon the plans.

In short, because it is imposed directly on self-insured ERISA plans and targets their provision of health care benefits, the 13% surcharge for those reasons alone "relates to" those plans for purposes of § 514(a).[5] This, we submit, is the teaching of the two decisions of this Court holding state laws preempted as applied directly to self-insured ERISA plans by virtue of their performance of their core functions. In *Shaw* v. *Delta Air Lines, Inc.*, 463 US. 85 (1983), The Court ruled preempted a state statute prohibiting discrimination in employee benefit plans on the basis of pregnancy.[6] While the law did not apply only to ERISA plans, the Court had "no difficulty in concluding" that it "relate[d] to" such plans because it "pro-

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[5] Accordingly, the surcharge cannot be listed as among those laws of "general applicability" that this Court has noted may be more likely than other laws to have a "tenuous, remote or peripheral" effect on ERISA plans. *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580, 583 n.1 (1992). Rather, the surcharge is primarily addressed to and primarily affects ERISA plans. It is assessed upon a limited category of payors of hospital bills, and there can be little doubt that the vast majority of payments to hospitals by entities in this category are made either by insured or self-insured plans subject to ERISA. Hence, the 13% surcharge is hardly "generally applicable" even to all payors for hospital services, no less the population at large.

[6] For an explication of the Court's ruling as to a second statute involved in *Shaw*, see *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580, 585 (1992).

hibit[ed] employers from structuring their employee benefit plans" in a certain manner. Id. at 96-97. And in *FMC Corporation* v. *Holliday*, 498 U.S. 52 (1990), the Court ruled that § 514(a) applied to a state law barring both ERISA and non-ERISA plans from asserting subrogation with respect to a beneficiary's tort recovery.[7] Any number of decisions in the courts of appeals are of similar import. See, *e.g.*, *Travitz* v. *Northeast Dep't ILGWU Health and Welfare Fund*, 13 F.3d 704, 709-10 (3d Cir. 1994) (state bar against recovery from tortfeasor of amounts otherwise payable by self-insured plan "relates to" that plan); *Auto Club Ins. Ass'n* v. *Health and Welfare Plans, Inc.*, 961 F.2d 588, 592-93 (6th Cir. 1992) (state coordination of benefits rule, as applied to self insured plans, "relates to" them); *Mullenix* v. *Aetna Life and Casualty Ins. Co.*, 912 F.2d 1406, 1408-09 (11th Cir. 1990) (application to self-insured plans of state mandate that chiropractic services be covered "relates to" such plans); *Brown* v. *Granatelli*, 897 F.2d 1351, 1353-55 (5th Cir. 1990) (application to self-insured plans of state requirement that health insurance policies cover newborns with congenital defects "relates to"

[7] Other § 514(a) decisions by the Court accord with this analysis. In three cases, the challenged state laws did not apply directly to ERISA plans, but the Court held them preempted nonetheless because there was a substantial indirect impact that bore specifically on the plans' activities in providing benefits. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133 (1990); and *Greater Washington Board of Trade*, 113 S. Ct. 580 (1992). In a fourth case, on the other hand, the Court upheld state laws that impacted ERISA plans only indirectly and that did not impinge upon interests, such as uniformity, that ERISA was designed to secure. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987). Finally, in *Mackey*, 486 U.S. 825 (1988), while the state law—a general garnishment statute—did apply directly to ERISA plans, it was not aimed specifically at the activities they conducted because they were benefit plans. In any event, the Court viewed other ERISA provisions as evidencing a legislative intent under which such statutes were permissible. For a similar ruling, see *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

such plans even if they have purchased stop-loss insurance); *PPG Indus. Pension Plan A (CIO)* v. *Crews*, 902 F.2d 1148, 1150-51 (4th Cir. 1990) (state law prohibiting particular method of integrating pension and workers' compensation benefits as applied to self-insured plans "relates to" such plans); *Baxter* v. *Lynn*, 886 F.2d 182, 185 (8th Cir. 1989) (state law that "prohibit[s] employers from structuring their [self-insured plans] in a manner that requires reimbursement" by plan participant who recovers from third-party "relates to" such plans).[8]

There is in addition a further reason why New York's 13% surcharge "relates to" self-insured plans: It is designed to induce them, although they may be nationwide and collectively bargained, as are the Railroad Plans, to change their basic structure and administration—from self-insurance administered on a national or multistate regional basis by the entity of their choice to insurance with the Blues in New York.

A primary goal of the 13% surcharge when enacted was to encourage providers of health care benefits, be they commercial insurers or self-insured plans, to insure those benefits with the Blues. The court of appeals found that the surcharge "was meant to '"level [the] playing field"' for the Blues . . . (citations omitted). The hope was that this would encourage more employers and ERISA plans to subscribe to the Blues." JA 37. See also Gov't Br. at 9 (the surcharges "are *designed* to give the Blues a rate advantage in the marketplace, thereby encouraging more customers to purchase coverage from the

[8] The decision of the Third Circuit Court of Appeals in *United Wire*, 995 F.2d 1179 (3d Cir. 1993), appears to depart from this approach. We think it incorrect, but in any event, as we hereafter note in the text, the 13% surcharge is materially different from, and more pernicious than, the laws involved in *United Wire* in that New York's surcharge designedly interferes with a plan's determination of what its basic structure and administration should be.

Blues and helping maintain the solvency of the Blues." (Emphasis added.)).

By penalizing self-insured plans that choose not to switch to insurance with the Blues in New York, New York seeks to compel those plans to reverse their decisions to be self-insured. Those decisions are made by large and mature plans, like the Railroad Plans, for very good reasons. Such plans can predict with substantial accuracy what their benefits and related expenses will be in any given year, thus minimizing the need to insure against the risk that benefits and expenses will exceed available funds. On the other hand, becoming insured triggers the application to the plans of a long list of burdensome and costly state insurance laws and regulations, such as mandated benefit laws, mandated provider laws and premium taxes, from which Congress plainly intended, through the deemer clause in § 514(b)(2)(B) of ERISA, 29 U.S.C. § 1144(b)(2)(B), to protect self-insured plans.[9]

In *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985), this Court recognized, and gave effect to, this legislative intent in a fashion directly relevant here. The Court held that a state law requiring that certain minimum mental health-care benefits be provided in insurance policies "relate[d] to" insured ERISA plans under § 514(a) but was "saved" under the insurance saving clause. The Court ruled, however, that the law could not be "saved" as to self-insured plans because of the deemer clause. In language closely in point here, the Court took note of Congress' intent to afford a special measure of protection to self-insured plans, an intent confirmed by post-ERISA legislative consideration:

[9] The deemer clause provides, in effect, that state laws that "relate to" self-insured plans under § 514(a) of ERISA cannot be applied to those plans even if the laws are not preempted, as applied to insured plans, because they are laws "which regulate insurance" for purposes of the saving clause. § 514(b)(2)(B) of ERISA, 29 U.S.C. § 1144(b)(2)(B).

"We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one it has chosen not to alter.[25]

[25] A 1977 Activity Report of the House Committee on Education and Labor recognized the difference in treatment between insured and non-insured plans: 'To the extent that [certain programs selling insurance policies] fail to meet the definition of an "employee benefit plan" [subject to the deemer clause], state regulation of them is not preempted by section 514, even though such state action is barred with respect to the plans which purchase these "products".' H.R. Rep. No. 94-1785, p. 48. A bill to amend the saving clause to specify that mandated-benefit laws are preempted by ERISA was reported to the Senate in 1981 but was not acted upon." (Citation omitted.) *Id.* at 747 & n.25.

Congress' differentiation in ERISA between insured and self-insured plans and its determination to afford self-insured plans greater insulation from state regulation, all as recognized by this Court in *Metropolitan Life*, strongly support the view that the 13% surcharge as applied to self-insured plans "relates to" them for purposes of § 514(a) even if a contrary conclusion were reached regarding application of the surcharge to insured plans.

We should note here, as we did in the court of appeals without contradiction by petitioners, that, under New York law, self-insured plans apparently cannot avoid the 13% surcharge by hiring the Blues to administer their self-insured programs. The surcharge is imposed on all payments for services provided to patients "enrolled in a self-insured fund which provides for reimbursement directly to general hospitals." N.Y. Pub. Health Law § 2807-c(1)(b) (McKinney Supp. 1993). The exclusion from the surcharge that favors the Blues is for payments for services "provided in accordance with *policies writ-*

ten" by the Blues. *Id.* at § 2807-c(1)(a) (emphasis added). Self-insured plans do not buy "policies written" by the Blues, or by any other insurer, and so make no payments to hospitals in accordance with any such "policy." Thus, even if administered by the Blues, self-insured plans are apparently required to pay the surcharge. They must become insured by the Blues to avoid it.

Even if the surcharge were not applicable to self-insured plans administered by the Blues, its impact upon national, collectively bargained, self-insured plans—like the Railroad Plans—would still be intolerable. To be sure, the plans would not have to buy insurance from the Blues to avoid the penalty, but their choice would remain unacceptable: pay the surcharge or appoint a different administrator in New York than elsewhere, even though uniform administration on a nationwide or multistate regional basis has long been a hallmark of interstate plan operations, as is the case with the Railroad Plans, and a practice collectively bargained, as is also the case with the Railroad Plans. Indeed, such uniform administration is likely to be the *modus operandi* for most nationwide health care benefit plans collectively bargained by management and labor, since it diminishes disparate treatment of plan participants and beneficiaries depending upon where they happen to live.

A plan with otherwise uniform administration that is forced upon pain of the surcharge to use a separate administrator—the Blues—in New York will be saddled with administrative burdens and inefficiencies that it does not now have. Among other things, such a plan would need to negotiate separate administrative service contracts, meld claims and other reports of separate administrators with separate information systems into a unified format, and make sure that the administrators interpret plan provisions—such as what services are medically necessary and what charges are reasonable and customary—in the same fashion.

And what if other states, following New York's lead, elected to penalize self-insured, collectively bargained, nationwide, ERISA-covered plans for failure to become insured with companies or to appoint administrators that for policy reasons these other states favored, companies and administrators that would not be the New York Blues and in all probability would be different from state to state? Surely, ERISA does not contemplate that a plan be faced with appreciable penalties in any number of states if it refuses to balkanize its structure and administration, since such a choice would threaten the uniformity that Congress in ERISA sought to promote. See 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits); 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). The preemption clause was expressly designed to protect ERISA plans from efforts by states to require "the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990). See also *Shaw*, 463 U.S. at 105 ("By establishing benefit plan regulation 'as exclusively a federal concern,' (citation omitted), Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees.").

That plans like the Railroad Plans are the product of nationwide collective bargaining adds special force to their concern over the threat posed by the 13% surcharge to a comprehensive, uniform scheme of benefit administration. This Court has recognized that where ERISA-covered plans "emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate" their terms. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). See also *PPG Indus. Pension Plan A (CIO)* v. *Crews*, 902 F.2d 1148, 1151 (4th Cir. 1990) (same). "As a subject of collective bargaining, [plan] terms themselves become expressions of federal law, requiring preemption of intru-

sive state law." *Alessi*, 451 U.S. at 526. The New York surcharge attaches to self-insured, collectively bargained, ERISA-covered plans because the collective bargainers chose not to negotiate the kind of arrangement that New York favors, *i.e.*, insurance with the Blues. Such a law certainly interferes with and intrudes upon the federally protected bargaining process.

Respondents have cited a number of decisions holding preempted state laws affecting ERISA plans in ways analogous to the impact of the 13% surcharge. We draw the Court's attention in particular to *National Elevator Industry, Inc.* v. *Calhoon*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992), a case remarkably similar to the one at bar insofar as the applicability of ERISA's "relates to" clause is concerned. There, an industry association claimed that ERISA preempted a ruling by the Oklahoma Commissioner of Labor requiring employers to pay helpers on state projects at the higher wage level applicable to mechanics, unless the helpers had enrolled in a training program approved by the federal Bureau of Apprenticeship Training ("BAT"). The employers, however, funded an ERISA-covered, national, helpers training plan that had apparently not been approved by BAT. In a conclusion equally applicable in this case—one need only substitute "hospital rates" for "wages"—the court wrote:

> "We accept, as a general proposition, the state's right to regulate wages. But a wage law that provides an option favoring certain ERISA plans and benefits (BAT approved plans) over other ERISA plans and benefits [the employers' plan] is not a law of 'general application' and may be used to effect change in the administration, structure and benefits of an ERISA plan. If a state is permitted to use a prevailing wage scheme to single out and favor certain ERISA plans over other ERISA plans, the potential for abuse is great—a state could avoid ERISA's preemption provision and covertly disturb

> or alter ERISA plans. We believe that [the Commissioner's] ruling would discourage non-BAT approved ERISA training programs and encourage changes to [the employers' plan], a national employee benefit program. We hold that [the Commissioner's] ruling applying the state's prevailing wage law does 'relate to' an employee benefit plan because the ruling's effects on [the employers' plan] are not 'tenuous, remote or peripheral.'" 957 F.2d at 1561.[10]

B. The "Saving" and "Deemer" Clauses.

A state law "which regulates insurance" is saved from preemption by § 514(b)(2)(A) of ERISA. This insurance "saving" clause is limited, however, by the so-called "deemer" clause § 514(b)(2)(B). The deemer clause forbids states from deeming an employee benefit plan "to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . . ."

We agree with respondents, who have fully briefed the question of the applicability of the saving clause to the 13% surcharge as applied to insured plans, that under any "common sense" reading of the surcharge provision, see *Metropolitan Life*, *supra*, the saving clause does not come into play. The surcharge regulates hospital rates, not insurance.

That the saving clause does not save the surcharge from preemption as applied to self-insured plans is even clearer. The deemer clause is the beginning and end of the inquiry. It precludes application of the saving clause to a law

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[10] The court also noted that the Commissioner's ruling "has the effect, and possibly the aim, of encouraging participation in a specific type of ERISA plan (BAT approved apprentice plans) while discouraging participation in a different type of ERISA plan," *i.e.*, the employers' plan. 957 F.2d at 1559.

preempted by § 514(a) because it "relates to" a self-insured ERISA plan.

In *FMC Corporation* v. *Holliday*, 498 U.S. 52 (1990), this Court concisely and clearly stated the governing principles in terms that control in this case:

> "[S]elf-funded ERISA plans are exempt from state regulation insofar as that regulation *'relate[s] to'* the plans. State laws directed toward the plans are pre-empted because they relate to an employee benefit plan but are not 'saved' because they do not regulate insurance. State laws that directly regulate insurance are 'saved' but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws." 498 U.S. at 61 (emphasis added).

Courts of appeal have applied these principles consistently to preempt, as applied to self-insured plans, any state laws that otherwise regulate insurance. *E.g.*, *Tri-State Machine, Inc.* v. *Nationwide Life Ins. Co.*, 33 F.3d 309, 315 (4th Cir. 1994); *Electro-Mechanical Corp.* v. *Ogan*, 9 F.3d 445, 450 (6th Cir. 1993); *Travitz* v. *Northeast Dep't ILGWU Health and Welfare Fund*, 13 F.3d 704, 710 (3d Cir. 1994); *Hampton Indus., Inc.* v. *Sparrow*, 981 F.2d 726, 729-30 (4th Cir. 1992). The result should be no different here.[11]

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[11] This Court observed in *Metropolitan Life* that Massachusetts had "never tried to enforce" in connection with self-insured ERISA plans a state law that otherwise regulated insurance, thus "effectively conceding" that ERISA would preempt such application. 471 U.S. at 735 n.14. Moreover, as we noted earlier, *supra* at 12-13, in the court of appeals the Secretary of Labor expressly acknowledged that the deemer clause protected self-insured plans from application of the insurance saving clause in this case.

CONCLUSION

In closing, we briefly take note of the efforts of petitioners to depict the court of appeals' decision as inimical to sound public policy. They contend that its decision would radically undermine the authority of the states to determine how best to distribute the costs of health care. But certainly preemption affecting only state laws, like New York's 13% surcharge, that are imposed directly on self-insured plans by virtue of their core function—the provision of health care benefits—would have no such effect. Nor would the further extension of preemption to laws designed to force insured ERISA plans to turn to state-favored insurance carriers. Moreover, the wisdom of requiring those who need and can afford health care to bear a large share of those costs, as does New York, rather than subsidizing hospitals with funds from taxes that are not levied on health care general revenues, is at least questionable. In any case, this general subject has been at the heart of Congressional debate over the last year, a debate that most expect will soon be renewed. Congress, in the preemption provision of ERISA, has marked that debate as the appropriate forum for petitioners to make their case.

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

CITATIONS TO THE RECORD IN THE LOWER COURTS

A. District Court Proceedings.

1. *The complaints.* In separate complaints subsequently consolidated, Travelers Insurance Company ("Travelers") and the Health Insurance Association of America and other trade associations and insurance companies (collectively the "HIAA Plaintiffs") brought suit both as sellers (or associations of sellers) of commercial insurance to ERISA plans and as claims fiduciaries (or associations of claims fiduciaries) of self-insured ERISA plans. Travelers' Complaint ¶¶ 8, 10-13, 21 at JA 68 through JA 86; HIAA Plaintiffs' Amended Complaint ¶¶ 11, 13-17, 19 at JA 87 through JA 104. The HIAA Plaintiffs' complaint alleged that the "vast majority of persons covered by commercial health insurance and self-insured plans, . . . receive that coverage pursuant to employee benefit plans subject to ERISA," HIAA Plaintiffs' Complaint ¶¶ 5, 33 at JA 88-89, JA 97, and that the 13% surcharge would have the effect of forcing both insured and self-insured plans to increase the cost of their benefit plans, to reduce the scope of the benefits provided under their plans, or "to choose other means for [plan] funding," *id.* ¶¶ 5, 6 at JA 88-89; ¶¶ 33-37 (insured plans); 38-41 at JA 97-99 (self-insured plans). See also Travelers' Complaint ¶¶ 58-60 at JA 81-82. Both complaints prayed for a declaration that ERISA preempts the 13% surcharge as applied to self-insured and insured plans and an injunction barring defendants from enforcing that surcharge to self-insured and insured plans. Travelers' Complaint ¶¶ 62-63 at JA 82 & Prayer ¶ (c) at JA 85; HIAA Plaintiffs' Amended Complaint ¶ 53 at JA 101 & Prayer ¶¶ (ii), (iv) at JA 103-04.

2. *The summary judgment motions.* Both Travelers and the HIAA Plaintiffs moved for summary judgment on

various counts of their complaints, including in each case the count in which they claimed that ERISA preempts the 13% surcharge as applied to both insured and self-insured ERISA plans. Travelers' Notice of Motion for Summary Judgment at 2 (Ex. 1 hereto at 9a); Travelers' Complaint Count IV (13% surcharge) at JA 81-82; HIAA Plaintiffs' Notice of Motion at 2 (Ex. 2 hereto at 11a); HIAA Plaintiffs' Amended Complaint Count Two (13% surcharge) at JA 101. Moreover, in support of their motions, plaintiffs filed affidavits replete with statements of fact about self-insured plans, plaintiffs' involvement with them as claims fiduciaries, and the impact upon them of the 13% surcharge. Gutterman Affidavit ¶¶ 1-5, 7-9, 15-19, 25 at JA 115-118, JA 120-21, JA 122; Musco Affidavit ¶¶ 4, 6, 13-14 at JA 123-25; Donnelly Affidavit ¶¶ 4, 6 at JA 127-28; D'Amico Affidavit ¶ 4 at JA 130; Welch Affidavit ¶¶ 3-9, 11, 13 at JA 131-34; Shapland Affidavit ¶¶ 8, 9 at JA 140; Sujecki Affidavit ¶¶ 1,5, 6 at JA 298, JA 300.

That the summary judgment motions sought resolution of the issue of ERISA preemption of the 13% surcharge as applied to self-insured plans is also indicated in the affidavits submitted by defendants. Anderman Affidavit ¶¶ 28, 29 at JA 156-57; Klein Affidavit ¶ 43 at JA 189.

3. *The district court's decision.* The district court by order of February 4, 1993, granted plaintiffs' motions for summary judgment in all respects pertaining to the 13% surcharge. In addition, the court enjoined defendants from enforcing that surcharge (and the other surcharges that plaintiffs had challenged) "against any commercial insurers or HMOs in connection with their coverage of any ERISA plans." Pet. App. at 89-90.

In discussing the inapplicability of ERISA's insurance saving clause to self-insured plans, the district court held, citing *FMC Corporation* v. *Holliday*, 498 U.S. 52 (1990), that "those portions of the 13% Surcharge re-

ferring to self-insured plans could not possibly fall within the scope of the savings clause because . . . self-insured plans do not engage in the 'business of insurance' as a matter of law." Pet. App. at 79.[1] The court also ruled that, as a matter of law, HMOs are not engaged in the business of insurance. *Id.* at 70 & n.14.

In addition to granting summary judgment to plaintiffs with respect to the surcharges, the district court's order also enjoined enforcement of the surcharges against "any commercial insurers or HMOs in connection with their coverage of any ERISA plans." Pet. App. at 89-90.

4. *The district court's stay and related order.* Plaintiffs did not appeal the court's grant of summary judgment to them. Defendants, however, did appeal. They also moved to stay the district court's February 4, 1993, order pending appeal.

In opposition to defendants' stay motion—which the district court granted on February 9, 1993, but only with respect to the 13% surcharge, Pet. App. at 98—Travelers submitted the affidavit of Timothy F. Lyons. The Lyons Affidavit stated that the 13% surcharge applies to both insured and self-insured plans, Lyons Affidavit ¶ 8 at JA 324; that Travelers "is not even in a position to continue paying the surcharge with regard to its self-insured ERISA customers," id. ¶ 12 at JA 325; that because ERISA obli-

[1] To be sure, the court stated elsewhere in its opinion that the "Surcharges do not directly increase a plan's costs or effect the level of benefits to be offered. However, there can be little doubt that the Surcharges at issue will have a significant effect on the commercial insurers and HMOs which do or could provide coverage for ERISA plans and thus lead, at least indirectly, to an increase in plan costs" because plaintiffs will pass the surcharge on to their plan customers. Pet. App. at 71 (footnotes omitted). This analysis ignores self-insured plans since they themselves pay the surcharge. There is no passing through from insurer to plan in the form of higher premiums. Rather, the surcharge directly increases the plan's costs.

gates plan fiduciaries to use plan funds for the exclusive benefit of plan participants and beneficiaries, fiduciaries of self-insured plans could be expected to "refuse to continue to pay the 13% surcharge," *id.*; and that two non-party, self-insured plans for which Travelers provides administrative claims services had in late 1992 instructed Travelers "not to use any plan assets to pay the 13% surcharge" because the self-insured plans had concluded that ERISA preempted the 13% surcharge as applied to them, *id.* The self-insured plans to which the Lyons Affidavit referred were the Railroad Plans.

Shortly after the district court had stayed its order as to the 13% surcharge, Travelers advised the court by letter that the Railroad Plans had informed Travelers that the Plans' prior instruction not to pay the surcharge remained in effect. (Ex. 3 hereto at 14a.) The intervening defendants, in letters to the court, objected to nonpayment of the 13% surcharge by the Railroad Plans. (Exs. 4, 5 hereto at 17a, 20a.)[2] The NCCC also wrote to the district court explaining the NCCC's position as fiduciaries of the Railroad Plans. (Ex. 7 hereto at 25a.)

The district court resolved the dispute in an April 27, 1993, order that contained the following recitations:

> "WHEREAS . . . this Court held that federal law preempts certain provisions of the New York Public Health Law, including the 13% differential . . . ; and WHEREAS . . . this Court granted defendants' motion for a stay pending appeal of such . . . Order insofar as it concerns the 13% differential; and WHEREAS . . . two self-insured ERISA plans for which Travelers provides administrative services—[the Railroad Plans]—had instructed Travelers not to pay the 13% differential. . . ."

[2] Travelers responded in writing to intervening defendants' letters to the court. (Ex. 6 hereto at 23a.)

Furthermore, the order itself provided:

> "[T]he named parties to this action, including Travelers, in its capacity as claims fiduciary of the Railroad Plans, are directed to pay the 13% differential with respect to all hospital claims, where applicable [under New York's Public Health Law], whether incurred before or after the date hereof." (Ex. 8 hereto at 30a-31a.)

The court noted that its order applied to the trade association plaintiffs "only to the extent they serve directly as fiduciaries of ERISA plans" and that the order "does not impose on any person any obligation to pay the 13% differential except to the extent such obligation otherwise exists under the relevant contracts and/or New York law." *Id.*

B. Court of Appeals Proceedings.

1. *The briefs.* The briefs submitted on appeal by the appellants argued that ERISA did not preempt the 13% surcharge as applied to self-insured plans. The brief of intervenors-defendants-appellants The New York State Conference of Blue Cross and Blue Shield Plans and Empire Blue Cross and Blue Shield (hereinafter "the Blues") stated: "[I]f New York is prohibited from charging commercial insurers and self-insured plans the DRG rate including the differentials, it is highly speculative what rate these payors will be required to pay." Brief at 21 (hereinafter "Blues App. Br."). In addition, the Blues acknowledged that the surcharges "discriminate against commercial insurers and self-funded plans by increasing their costs," *id.* at 29, and argued in response that "[c]ountless state laws will influence a plan's decision regarding whether to self-insure or purchase insurance from a commercial insuror or from a Blue Plan," *id.* at 30. See also *id.* ("[a]ny law or regulation which lowers the Plans' costs of doing business . . . would . . . impact commercially insured and self-insured ERISA

plans"); Blues App. Reply Br. at 1, 3, 5 n.6 (further attempts to refute discriminatory basis of 13% surcharge).[3]

The Blues responded directly to the contention in the *amicus* brief of the NCCC that the Railroad Plans would have to become insured through the Blues in New York to avoid payment of the 13% surcharge, Blues App. Reply Br. at 10 n.11, and that the surcharge hindered the uniform operation of self-insured plans nationwide, *id.* at 9-10. Finally, the Blues challenged the district court's ruling that the saving clause does not apply to self-insured plans and further argued that the deemer clause is similarly inapplicable. Blues App. Br. at 37-40.[4]

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[3] The briefs of the State of New York ("State") and the Hospital Association of New York State ("HANYS") generally treated all payors of the 13% surcharge collectively, and made few argumentative distinctions among them. Hence, most of their references to self-insured plans were merely descriptive of the statute. Brief for Defendants-Appellants State at 5, 7, 20, 28 n.32, 36 (hereinafter "State App. Br."); Brief on Appeal for Intervenor-Defendant-Appellant HANYS at 21, 25-26, 35 (hereinafter "HANYS App. Br."); HANYS App. Reply Br. at 2, 3, 9, 17. Additional references to self-insured plans were made in connection with appellants' contentions that the statute did not discriminate among payors based on their ERISA status; that uniform costs between the Blues and commercial insurers/self-insured plans could never be achieved; or that no evidence existed that the surcharge increased the cost of self-insured plans or otherwise provided an incentive for them to switch to the Blues. State App. Br. at 7, 20, 21; State App. Reply Br. at 5, 8-9, 8 n.11, 10 n.15; HANYS App. Reply Br. at 3, 5-6, 8-9, 15-16; Petition for Rehearing with Suggestion *En Banc* for Intervenor-Defendant-Appellant-Cross-Appellee HANYS at 2, 5, 8.

[4] Plaintiffs/appellees understood that appellants were challenging in the court of appeals the district court's ruling that the 13% surcharge was preempted by ERISA as applied to all applicable entities, including self-insured plans. App. Br. for the HIAA Plaintiffs-Appellees and Plaintiff-Appellee-Cross-Appellant Travelers at 2, 3, 7, 8, 11, 12, 13, 14, 18, 21, 22, 25, 29, 35, 36, 39, 45, 46, 47, 49-50, 62-65.

2. *The opposition to the filing of an amicus brief by the NCCC.* Counsel for intervenor-defendant-appellant HANYS submitted an affidavit (Ex. 9 hereto at 32a) opposing the NCCC's motion for leave to file an *amicus* brief with the court of appeals. Paragraphs 3 and 4 of the affidavit stated:

> "First, the Court already has been favored with briefs from five sets of parties and from four amicus curiae, covering all of the issues. In particular, the interests of all self-insured plans, and the Railroad Plans specifically, are already represented. Plaintiff The Travelers Insurance Company ("Travelers") acts as fiduciary or otherwise provides administrative services to self-insured plans, including the Railroad Plans. Travelers has specifically lodged its complaint in such capacity. *See* JA-57-63. The additional brief which the Railroad Plans seek to submit is merely cumulative and does not provide the Court with any new positions or perspectives necessary for a full presentation of the issues.

More importantly, Intervenor-Appellant Hospital Association of New York State did not consent to the Railroad Plans filing an amicus brief because of the Plans' violation of the Stay Order of the District Court. A copy of our letter on behalf of the Hospital Association is annexed hereto. As the Railroad Plans' April 14, 1993 memorandum of law in support of their motion acknowledges (at p. 3), the Railroad Plans have chosen to defy New York law and have refused to continue paying the 13% differential on hospital charges which is at issue on this appeal. While the court below found that differential preempted by federal law, the court stayed the portion of its Order directed to such 13% differential, pending the outcome of this appeal. *See* JA-1863-69. Accordingly, the 13% differential remains in effect, and the Railroad Plans' refusal to pay it amounts to

willful defiance of the Stay Order and/or state law." Ex. 9 ¶¶ 3-4 at 33a-34a.

3. *The court's decision.* The court of appeals' opinion made few differentiations as to any one surcharge and almost none as to payor status. For example, the court stated that the "13% and 11% surcharges are designed to increase hospital costs for patients covered by health plans other than the Blues, and thus make these competing plans less attractive than the Blues . . . . Thus, the surcharges purposely interfere with the choices that ERISA plans make for health care coverage." JA 52. See also JA 53 ("The surcharges substantially increase the cost to ERISA plans of providing beneficiaries with a given level of health care benefits." "[T]he surcharges here force ERISA plans to increase either plan costs or reduce plan benefits.").

The court of appeals also addressed in a general fashion the application of the saving clause to the surcharges, concluding that the 13% and 11% surcharges do not "regulate insurance." JA 56. Although "the surcharge laws provide for different payment rates based on whether a patient is uninsured, covered by an HMO, a commercial insurer or a self-insured health plan," the surcharge laws did not address matters typically within the purview of state insurance regulations. JA 57. Again, the court's analysis of the saving clause did not rely on differences in payor status.

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 3999 (LJF)
(CM 0773)

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

-against-

MARIO M. CUOMO, in his Official Capacity as Governor of the State of New York, MARK CHASSIN, M.D., in his Official Capacity as Commissioner of Health of the State of New York, and SALVATORE R. CURIALE, in his Official Capacity as Superintendent of Insurance of the State of New York,
Defendants,

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS, EMPIRE BLUE CROSS AND BLUE SHIELD and HOSPITAL ASSOCIATION OF NEW YORK STATE,
Intervenors.

NOTICE OF MOTION
FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that upon the accompanying affidavit of Darrell M. Joseph, sworn to August 20, 1992, and the exhibit thereto, the accompanying affidavit of James M. Gutterman, sworn to August 17, 1992, and the exhibits thereto, the annexed Amended Statement pursuant to Rule 3(g) of the Civil Rules of this Court and the accompanying memorandum of law, plaintiff The Travelers Insurance Company, by its attorneys, Windels, Marx, Davies & Ives, will move this Court, before the Honorable Louis J. Freeh, United States District Judge,

in Courtroom 312, United States Courthouse, 40 Centre Street, Foley Square, New York, New York 10007, on the 21st day of August, 1992, at 9:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 56(c) of the Federal Rules of Civil Procedure granting summary judgment in its favor and against defendants on the ground that there exists no genuine issue as to any material fact with respect to Counts I, IV and VI of plaintiff's Complaint, and that plaintiff is entitled to judgment as a matter of law, and granting plaintiff such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the schedule previously agreed to by the parties and approved by the Court, as reflected in the Court's endorsement of plaintiff's counsel's letter to the Court of August 11, 1992, filed on August 12, 1992, the parties shall adhere to the following briefing schedule: (1) defendants' (including intervenors') papers in opposition to plaintiff's motion and in support of any cross-motions for summary judgment are due to be served on or before October 2, 1992; (2) plaintiff's reply papers are due to be served on or before October 16, 1992; and (3) any additional papers from defendants (including intervenors) are due to be served on or before October 22, 1992.

Dated: New York, New York
August 21, 1992

WINDELS, MARX, DAVIES & IVES

By: /s/ Craig P. Murphy
CRAIG P. MURPHY (CM 0773)

Attorneys for Plaintiff
The Travelers Insurance Company
156 West 56th Street
New York, New York 10019
(212) 237-1000

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 5419 (LJF)

THE HEALTH INSURANCE ASSOCIATION OF AMERICA, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE LIFE INSURANCE COUNCIL OF NEW YORK, INC., AETNA LIFE INSURANCE COMPANY, AETNA HEALTH PLANS OF NEW YORK, INC., MUTUAL OF OMAHA INSURANCE COMPANY, THE UNION LABOR LIFE INSURANCE COMPANY, and PROFESSIONAL INSURANCE AGENTS OF NEW YORK, INC. TRUST,

Plaintiffs,

-against-

MARK CHASSIN, M.D., in his Official Capacity as Commissioner of Health of the State of New York, MARY JO BANE, in her Official Capacity as Commissioner of Social Services of the State of New York, SALVATORE R. CURIALE, in his Official Capacity as Superintendent of Insurance of the State of New York, and ROBERT ABRAMS, in his Official Capacity as Attorney General of the State of New York,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the pleadings; the annexed statement pursuant to Rule 3(g) of the Civil Rules for the Southern District of New York; the accompanying Affidavits of Thomas D. Musco, and the annexed exhibit, executed on August 18, 1992, Vincent W. Donnelly, executed on August 18, 1992, Raymond A. D'Amico, executed on August 13, 1992, Mark R. Welch, executed on August 18, 1992, John P. Burke, executed

on August 19, 1992, Robert B. Shapland, executed on August 14, 1992, James R. Hibbitts, executed on August 13, 1992, Thomas L. Reddy, Sr., executed on August 17, 1992, and Angelo V. D'Ascoli, executed on August 19, 1992; the undersigned will move this Court, the Honorable Louis J. Freeh presiding, in Room 540, United States Courthouse, Foley Square, New York, New York, on October 26, 1992, at 9:00 a.m. or as soon thereafter as counsel may be heard, for an order:

(a) pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, granting summary judgment in favor of all plaintiffs and against all defendants on counts one through three of the Amended Complaint and enjoining enforcement of, and declaring invalid, Section 2807-c(1)(b) of the New York Public Health Law and Sections 346 and 348 of the New York Omnibus Revenue Act of 1992, insofar as they impose Surcharges increasing hospital charges for patients covered by employee welfare plans subject to ERISA that use commercial insurance, self-insurance, or health maintenance organizations to provide benefits to participants or beneficiaries; and

(b) granting plaintiffs such other and further relief as the Court may deem just and proper.

Further grounds for this motion are set forth in the accompanying memorandum of law.

Dated: New York, New York
August 21, 1992

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By: /s/ Sidney S. Rosdeitcher
SIDNEY S. ROSDEITCHER (SR-3127)
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Plaintiffs The Health Insurance Association of America, The American Council of Life Insurance, The Life Insurance Council of New York, Inc., Mutual of Omaha Insurance Company, The Union Labor Life Insurance Company, and Professional Insurance Agents of New York, Inc. Trust

HOGAN & HARTSON

By: /s/ Clifford D. Stromberg
CLIFFORD D. STROMBERG
(CS-3510)
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Attorneys for Plaintiffs Aetna Life Insurance Company and Aetna Health Plans of New York, Inc.

EXHIBIT 3

WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, NY 10019
(212) 237-1000

March 24, 1993

Craig P. Murphy
(212) 237-1234

BY HAND

Hon. Louis J. Freeh
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
40 Centre Street, Room 540
New York, New York 10007-9998

Re: The Travelers Ins. Co. v. Cuomo, *et al.*,
No. 92 Civ. 3999 (LJF)

Dear Judge Freeh:

I represent plaintiff The Travelers Insurance Company in connection with the above matter. I am writing to inform the Court of a recent development concerning the partial stay pending appeal which this Court granted on February 9, 1993.

On February 3, 1993, this Court granted plaintiff's motion for summary judgment and enjoined defendants from enforcing the three hospital surcharges at issue in this litigation on the grounds that they are preempted by ERISA. On February 9, 1993, this Court stayed its February 3 order to the extent it enjoined enforcement

of the 13% surcharge, but denied a stay of the order regarding the 9% and 11% surcharges.

As Your Honor knows, The Travelers brought this suit in its capacity as fiduciary of two ERISA plans, the B.H. Aircraft Plan and the Sheridan Catheter Plan, under Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). These plans are described, respectively, in paragraphs 18 and 21 of the complaint. The Travelers also provides commercial health insurance and/or administrative services in connection with other ERISA plans.

In the affidavit of Timothy F. Lyons, Esq., sworn to on February 8, 1993, which was submitted in opposition to the defendants' and certain intervenors' motions for a stay pending appeal, The Travelers explained that in late 1992, two non-party self-insured ERISA plans had instructed The Travelers to stop using plan assets to pay the 13% surcharge. The plans at issue are the Railroad Employees National Early Retirement Major Medical Benefit Plan and the Railroad Employees National Health and Welfare Plan (referred to collectively as "the Railroad Plans").

Following this Court's February 9, 1993 stay order, The Travelers again communicated with the Railroad Plans regarding the 13% surcharge. Within the last few days, the Committees charged with governance of the Plans have advised The Travelers that in light of the fact that the Railroad Plans are not parties to the case in which this Court's orders of February 3 and 9, 1993 were issued, and in consideration of the prohibition laid down by ERISA that plan assets not be disbursed to provide benefits for persons other than plan participants and beneficiaries, the Committees could not, consistently with their fiduciary duties under applicable law, reverse their earlier instructions to The Travelers and authorize the use of plan assets to pay the 13% surcharge.

Because the Railroad Plans are not parties to this litigation, it is our understanding that they are not subject

to this Court's February 9, 1993 stay order. Accordingly, The Travelers has concluded that it must follow the instructions of the Railroad Plans. However, because The Travelers, in its capacity as fiduciary of the B.H. Aircraft Plan and the Sheridan Catheter Plan, is a party to this litigation and subject to the stay order, I wanted to bring this matter to Your Honor's attention. I also wish to note that during the pendency of the appeal from Your Honor's February 3 order, The Travelers will continue paying the 13% surcharge on behalf of the Sheridan Catheter Plan, the B.H. Aircraft Plan and the other ERISA plans in connection with which The Travelers provides commercial health insurance. The Travelers has also recommended that all self-insured ERISA plans which receive administrative services from The Travelers continue paying the 13% surcharge.

Very truly yours,

/s/ Craig P. Murphy
CRAIG P. MURPHY

CPM:dr
cc: All Counsel in 92 Civ. 3999 (LJF), and 92 Civ. 5419 (LJF) (by facsimile)

bcc: Benjamin W. Boley, Esq. (by facsimile)
James M. Michener, Esq. (by facsimile)
Timothy F. Lyons, Esq. (by facsimile)
Darrell M. Joseph, Esq.

All HIAA Action Plaintiffs (by facsimile) (except the Aetna entities)

EXHIBIT 4

BREED, ABBOTT & MORGAN
Citicorp Center
153 East 53rd Street
New York, N.Y. 10022-4858

(212) 888-0800

March 29, 1993

BY HAND

Hon. Louis J. Freeh
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: *Travelers v. Cuomo*, 92 Civ. 3999 (LJF)

Dear Judge Freeh:

In his March 24, 1993 letter, Travelers' attorney, Craig Murphy, Esq., informs the Court that two self-insured ERISA plans for which Travelers acts as fiduciary have instructed Travelers to refuse to pay the 13% hospital differential, and that Travelers has chosen to abide by such position. This letter responds on behalf of intervenors Empire Blue Cross and Blue Shield and The New York State Conference of Blue Cross and Blue Shield Plans and, in accord with Your Honor's pre-motion procedures, prays leave to move for an Order enforcing your February 9, 1993 Order (the "Stay Order") and for whatever other relief this Court may deem appropriate.

The basic premise of Mr. Murphy's letter is inconsistent with Travelers' position in this action and is incorrect as a matter of law and fact. As purported justification

for the failure of these plans to pay the 13% differential, Mr. Murphy asserts: "Because the Railroad Plans are not parties to this litigation, it is our understanding that they are not subject to this Court's February 9, 1993 stay order." Thus, Mr. Murphy presses for the bizarre result that as supposed non-parties, the Railroad Plans obtain rights pursuant to the Court's February 3, 1993 decision greater than the parties themselves.

The effect of the Stay Order is to leave the 13% differential in place and applicable to all entities subject to it. Under the stay, the 13% remains the law, and the Railroad Plans, like all other similarly situated persons, continue to be obligated to pay it. Indeed, Mr. Murphy appears not to dispute but rather to acknowledge that State law requires payment of the 13% differential, stating: "The Travelers has also recommended that all self-insured ERISA plans which receive administrative services from The Travelers continue paying the 13% surcharge."

The Stay Order applies to Travelers with respect to all of the ERISA plans, whether fully insured or self-funded, for which Travelers acts as a fiduciary. Indeed, in its complaint, Travelers appears to sue not only on its own behalf but also on behalf of those ERISA plans for which it acts as a fiduciary. In fact, in Travelers' capacity as fiduciary, Travelers advised this Court, through ¶¶ 12-13 of the Lyons Affidavit submitted in opposition to Defendants' motion for a stay, of the very same information set forth in Mr. Murphy's current letter, *i.e.*, that self-insured plans would refuse to pay the differential and would direct Travelers not to pay it. This Court ruled against Travelers on the motion, finding specifically that ". . . ERISA plans . . . will only suffer monetary damages if the court's Order is stayed during appeal." Stay Order at 5. Now, once again, Travelers attempts to be relieved of its responsibility as fiduciary to make the payments. This action cannot be countenanced by the Court.

In any event, these plans are bound by Your Honor's Orders and subject to "contempt" as persons with "actual

notice" of the decree[s] of February 3 and 9, 1993. *Vuitton v. Carousel Handbags,* 592 F.2d 126, 129-30 (2d Cir. 1979). Particularly so where, as here, both such plans are plainly acting in concert with the plaintiff in this litigation, Travelers. *See* Fed. R. Civ. P. 65(d).

By refusing to pay the 13% differential, Travelers, as the fiduciary for these two Railroad Plans, has violated the law and is subject to whatever penalties and remedies may be available to the State and any other relevant person. Moreover, by altering the status quo they would appear exposed to whatever sanctions or other corrective actions this Court may deem in order, regardless of what decision ultimately may emanate from the Court of Appeals. *Cf. United States v. United Mine Workers,* 330 U.S. 258 (1947).[1] Such relief appears called for because the sole grounds asserted for failure to comply is an obvious misreading, indeed flouting, of Your Honor's Stay Order. It is of this Court's Stay Order that we would seek enforcement.

Respectfully,

/s/ Robert A. Bicks
ROBERT A. BICKS
BARTLEY J. COSTELLO

cc: All counsel

---

[1] The law is clear that under Fed. R. Civ. P. 62(c), the district court has jurisdiction to issue injunctions or other orders which preserve the status quo pending appeal. *See International Ass'n v. Eastern Airlines, Inc.*, 847 F.2d 1014, 1018 (2d Cir. 1988) (noting that Fed. R. Civ. P. 62(c) permits the district court to issue orders which preserve the status quo pending appeal). Moreover, as a leading commentator has stated: "[I]t has been held that the district court, which has granted an injunction pending appeal, may consider whether defendant is in contempt for violation of that order, even while the appeal is still pending." C. Wright & A. Miller, *Federal Practice and Procedure*, § 2905 at 325.

EXHIBIT 5

SHERRIN & GLASEL
Attorneys & Counselors at Law
74 North Pearl Street
Albany, New York 12207

(518) 465-1275

March 30, 1993

Hon. Louis J. Freeh
United States District Court
United States Courthouse
Foley Square
40 Centre Street, Room 540
NY, NY 10007-9998

Original Via Overnight Mail
Copy Via Hand Delivery

Re: *Travelers, et al. v. Cuomo, et al.*, 92 Civ. 3999, (LJF)

Dear Judge Freeh:

We are writing on behalf of the Hospital Association of New York State in response to the March 24, 1993 letter from Windels, Marx, Davies & Ives, attorneys for Travelers Insurance Company, wherein the Court is advised that Travelers is refusing to pay the 13% differential with respect to participants in two Railroad Plans. The justification presented for this refusal is that these Plans are not parties to the litigation, bound by the Court's Stay Order of February 9, 1993, and that Travelers is merely following the Plans' instructions. We are requesting the opportunity to seek affirmative relief from this Court, which may include a contempt order or other sanctions, an enforcement order or an appropriate clarification of the Stay Order with respect to the obligation of

these and other plans and commercial insurers to comply with the mandate of the Public Health Law.

In its Stay Order, this Court held that "loss of the 13% Surcharge will cause a substantial and irreparable disruption in the functioning of and services provided by New York's hospitals." (Stay Opinion and Order, p. 5). Further, this Court held that "the public interest in financially-stable hospitals and uninterrupted hospital services outweighs that monetary harm, and supports the imposition of a stay as to the 13% Surcharge." (Stay Opinion and Order, p. 5). The very purposes for issuance of the stay will be frustrated if a party to the action, Travelers, can with impunity ignore the Stay Order and the Public Health Law simply by claiming that the Plans, on whose behalves it sued as a fiduciary, are not bound by the Order.

Contrary to Travelers' assertion, these Plans are bound both by the Court's Order and by the Public Health Law, which imposes the 13% obligation. Travelers sued as fiduciary on behalf of ERISA plans, including the two Railroad Plans. Certainly, Travelers and the Plans fully expected to have the Plans enjoy the benefits of a judgment in Travelers' favor. If their position is that these two Plans are not bound by the Stay Order because they are not parties, then they are al not entitled to the fruits of the litigation. They would remain required to comply with the Public Health Law, even if Plaintiffs ultimately prevail. In any event, Travelers is bound by the Stay Order and the Public Health Law and must pay the 13%. A fiduciary is bound to act in conformance with law and judicial direction; it may not disregard its legal obligations on the excuse that its clients directed it to do so.

It is the intention of the Defendant-Intervenor Hospital Association of New York State to move this Court for an order enforcing or, if necessary, clarifying the Stay Order of February 9, 1993. The Court may, however, wish to schedule a telephone conference call among the parties

preliminary to the filing of any motion. We respectfully await your advice.

Respectfully submitted,

SHERRIN & GLASEL, ESQS.

/s/ Jeffrey J. Sherrin
JEFFREY J. SHERRIN

JJS/cl

cc: All counsel
(Via fax and overnight mail)

EXHIBIT 6

WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, NY 10019
(212) 237-1000

March 31, 1993

BY HAND

Hon. Louis J. Freeh
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
40 Centre Street, Room 540
New York, New York 10007-9998

Re: The Travelers Ins. Co. v. Cuomo, *et al.*,
No. 92 Civ. 3999 (LJF)

Dear Judge Freeh:

I am writing in response to the letters submitted on behalf of the Hospital Association of New York and Blue Cross/Blue Shield in response to my letter of March 24, 1993. The thrust of those letters is that The Travelers should be held in contempt or sanctioned for deliberately violating this Court's February 9, 1993 order. There is absolutely no basis for the imposition of sanctions or a finding of contempt against The Travelers.

As I previously explained in my March 24, 1993 letter, the committees charged with the governance of the Railroad Plans concluded that they could not, consistent with their fiduciary duties, allow the use of plan assets to pay the 13% surcharge. They have, therefore, instructed The

Travelers not to use plan assets for that purpose. After reviewing the situation, The Travelers decided that it had to obey these instructions since the Railroad Plans were not parties to this litigation and, therefore, not subject to the stay order. Recognizing, however, that others might disagree, The Travelers brought the situation to Your Honor's attention.

If The Travelers has misinterpreted the scope of this Court's stay order—which I believe is unlikely since this Court did not enter an injunction directing nonparty ERISA plans to continue paying the 13% surcharge but only stayed its earlier injunction prohibiting State officials from enforcing the surcharge—then the scope of this Court's February 9 order should be clarified. If, on the other hand, the Hospital Association or some other party wishes to expand the scope of this Court's February 9 order, then it should make the appropriate motion to do so.

Under no circumstances, however, should The Travelers be criticized or sanctioned for having forthrightly brought this matter to Your Honor's attention.

Very truly yours,

/s/ Craig P. Murphy
CRAIG P. MURPHY

CPM:dr

cc: All Counsel in 92 Civ. 3999 (LJF), and 92 Civ. 5419 (LJF) (via facsimile)

bcc: Benjamin W. Boley, Esq. (via facsimile)
James M. Michener, Esq. (via facsimile)
Timothy F. Lyons, Esq. (via facsimile)
Darrell M. Joseph, Esq.

All HIAA Action Plaintiffs (via facsimile)

EXHIBIT 7

SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

April 6, 1993

VIA EXPRESS MAIL

Hon. Louis J. Freeh
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
40 Centre Street, Room 540
New York, NY 10007-9998

Re: The Travelers Insurance Co. v. Cuomo, et al.
No. 92 CV 3999 (LJF)

Dear Judge Freeh:

We write this letter on behalf of the National Carriers' Conference Committee ("NCCC") as fiduciaries of The Railroad Employees National Health and Welfare Plan and The Railroad Employees National Early Retirement Major Medical Benefit Plan.[1] These plans, which provide for health benefits on a self-insured basis, have been collectively bargained on a national level by numerous railroads and railway labor organizations. They are referred to as the "Railroad Plans" in the letters sent to you by counsel for The Travelers Insurance Company dated March 24 and 31, 1993. Counsel for Travelers has pro-

[1] The NCCC is the governing body of fiduciaries for The Railroad Employees National Early Retirement Major Medical Benefit Plan, and, along with the Health and Welfare Committee, Cooperating Railway Labor Organizations, forms the governing body of fiduciaries for The Railroad Employees National Health and Welfare Plan.

vided us with copies of those letters, as well as copies of the letters sent to you on March 29 and March 30 by counsel for intervening defendants.

As fiduciaries of the Railroad Plans, the members of the NCCC are obligated by § 404(a)(1) of ERISA to discharge their duties to the Plans solely in the interests of Plan participants and beneficiaries and for the exclusive purpose of providing benefits to them and of defraying the reasonable expenses of administering the Plans. The NCCC members consider that this obligation requires that they, as Plan fiduciaries, not allow the disbursement of the assets of the nationwide Railroad Plans to pay a surcharge on general hospital bills that, as this Court concluded, is "simply designed to reduce the attractiveness of particular forms of medical coverage, in order to make [Blue Cross/Blue Shield] more competitive" in the State of New York, and that is considered by the Labor Department,[2] and, more significantly, by this Court, to be preempted by ERISA as applied to self-insured plans.

In short, as fiduciaries of the Railroad Plans, the members of the NCCC have sought only to carry out what they perceive their fiduciary duties to be. Consonant with that perception, the Railroad Plans have instructed Travelers not to pay the 13% surcharge. These instructions were given almost five months before the decision rendered by the Court in this case on February 3.

The NCCC does not understand that the Court, by its stay order of February 9, intended to override the duties owed to the Railroad Plans by their fiduciaries and to require disbursement of Railroad Plan assets to pay the 13% surcharge. The Court's February 9 order simply stayed its February 3 order enjoining enforcement of the 13% surcharge. The Court did not affirmatively order

[2] Brief for Secretary of Labor as Amicus Curiae at 9, *The Travelers Insurance Co. v. Cuomo* (No. 93-7132) ("It is the Secretary's position that ERISA preempts the surcharges as to self-funded plans, but not as to commercial insurers.")

payment of the surcharge. Surely, the Railroad Plans may not be held in contempt of an order that did not command performance by anyone—no less the Plans, which are not parties to the litigation—of the act that the Plans have not performed. *See International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967); *Town of Islip* v. *Eastern Air Lines, Inc.*, 793 F.2d 79, 83 (2nd Cir. 1986); *Stotler & Co.* v. *Able*, 870 F.2d 1158, 1163-64 (7th Cir. 1989); *Lichtenstein* v. *Lichtenstein*, 425 F.2d 1111, 1113 (3d Cir. 1970).

Perhaps in recognition of this proposition, counsel for intervening defendants have indicated their desire to move for an order requiring the Railroad Plans to pay the 13% surcharge. The Railroad Plans, however, are not parties to this action. Nor are they acting in concert with any party before the Court. Thus, the Court would appear to lack authority to enter the kind of an order counsel seems to have in mind. *See* Fed. R. Civ. Pro. 65(d); *Regal Knitwear* v. *National Labor Relations Bd.*, 324 U.S. 9, 14 (1945); *Heyman* v. *Kline*, 444 F.2d 65, 66-67 (2nd Cir. 1971); *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832, 832-33 (2nd Cir. 1930); *O & L Associates* v. *Del Conte*, 601 F.Supp. 1463, 1464-65 (S.D.N.Y. 1985).

Furthermore, because a notice of appeal has been filed, the Court's jurisdiction to issue orders is limited to those necessary to preserve the status quo pending appeal. *See* Fed. Rule Civ. Pro. 62(c); *International Ass'n of Machinists* v. *Eastern Air Lines, Inc.*, 847 F.2d 1014, 1018 (2nd Cir. 1988); *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F.2d 623, 625 (2nd Cir. 1962); *McClatchy Newspapers* v. *Central Valley Typographers Union No. 46*, 686 F.2d 731, 735 (9th Cir. 1982). Requiring the Railroad Plans to pay the 13% surcharge would alter the status quo rather than preserve it, because the Railroad Plans stopped paying the surcharge about four or five months before the Court rendered its February 3 decision.

The NCCC does not propose that the Plans ignore any lawful obligation they may have to the State of New York and its hospitals. If, in the end, the 13% surcharge is upheld, the Plans will pay it retroactively, and there can be no doubt of their capacity to do so.

Respectfully yours,

/s/ Benjamin W. Boley
BENJAMIN W. BOLEY

BWB/skb

cc: All counsel (Advance copy by fax)

EXHIBIT 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 3999 (LJF)

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

NEW YORK STATE HEALTH MAINTENANCE ORGANIZATION CONFERENCE, *et al.*,
Intervenor,

- against -

MARIO M. CUOMO, in his Official Capacity as Governor of the State of New York, *et al.*,
Defendants,

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS, EMPIRE BLUE CROSS AND BLUE SHIELD and HOSPITAL ASSOCIATION OF NEW YORK STATE,
Intervenors.

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92 Civ. 5419 (LJF)

THE HEALTH INSURANCE ASSOCIATION OF AMERICA, *et al.*,
Plaintiffs,

NEW YORK STATE HEALTH MAINTENANCE ORGANIZATION CONFERENCE, *et al.*,
Intervenors,

- against -

MARK CHASSIN, M.D., in his Official Capacity as Commissioner of Health of the State of New York, *et al.*,
Defendants.

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS, EMPIRE BLUE CROSS AND BLUE SHIELD and HOSPITAL ASSOCIATION OF NEW YORK STATE,

Intervenors.

ORDER

WHEREAS by Order, dated February 3, 1993, this Court held that federal law preempts certain provisions of the New York Public Health Law, including the 13% differential set forth in § 2807-c(1)(b) thereof and applicable to certain hospital charges ("the 13% differential"); and

WHEREAS by Order, dated February 9, 1993, this Court granted defendants' motion for a stay pending appeal of such February 3, 1993 Order insofar as it concerns the 13% differential; and

WHEREAS by letter, dated March 24, 1993, plaintiff The Travelers Insurance Company ("Travelers") informed the Court that two self-insured ERISA plans for which Travelers provides administrative services—the Railroad Employees National Early Retirement Major Medical Benefit Plan and the Railroad Employees National Health and Welfare Plan (collectively "the Railroad Plans")—had instructed Travelers not to pay the 13% differential, and that Travelers was following such instruction and not paying the 13% differential with respect to the Railroad Plans;

IT IS HEREBY ORDERED that pending a determination by the United States Court of Appeals for the Second Circuit of the appeals from this Court's February 3, 1993 order, the named parties to this action, including Travelers, in its capacity as claims fiduciary of the Railroad Plans, are directed to pay the 13% differential with respect to all hospital claims, where applicable under Section 2807-c(1)(b) of the New York Public Health Law, whether incurred before or after the date hereof. This order applies to plaintiffs Health Insurance Association of America, American Council of Life Insurance, and Life Insurance Council of New York, Inc. only to the extent they serve directly as fiduciaries of ERISA plans.*

SO ORDERED.

New York, New York

April 27, 1993

/s/ Louis J. Freeh
LOUIS J. FREEH
U.S.D.J.

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* This order does not impose on any person any obligation to pay the 13% differential except to the extent such obligation otherwise exists under the relevant contracts and/or New York law.

EXHIBIT 9

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

93-7132L
93-7134CON
93-7148CON
93-7194XAP

THE TRAVELERS INSURANCE COMPANY,
Plaintiff-Appellee,

NEW YORK HEALTH MAINTENANCE ORGANIZATION CONFERENCE,
Intervenor-Appellee,

v.

MARIO M. CUOMO, in his Official Capacity Governor of the State of New York, MARK CHASSIN, M.D., in his official Capacity as Commissioner of Health of the State of New York, and SALVATORE R. CURIALE, in his Official Capacity as Superintendent of Insurance of the State of New York,
Defendants-Appellants,

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS, EMPIRE BLUE CROSS AND BLUE SHIELD and HOSPITAL ASSOCIATION OF NEW YORK STATE,
Intervenors-Appellants.

THE HEALTH INSURANCE ASSOCIATION OF AMERICA, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE LIFE INSURANCE COUNCIL OF NEW YORK, INC., AETNA LIFE INSURANCE COMPANY, AETNA HEALTH PLANS OF NEW YORK, INC., MUTUAL OF OMAHA INSURANCE COMPANY, THE UNION LABOR LIFE INSURANCE COMPANY, and PROFESSIONAL INSURANCE AGENTS OF NEW YORK, INC. TRUST,
Plaintiffs-Appellees,

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

Jeffrey J. Sherrin, being duly sworn, deposes and says:

1. I am a partner in the law firm of Sherrin & Glasel, attorneys for the Intervenor-Appellant Hospital Association of New York State. I am admitted to practice in this Court.

2. I submit this affidavit in opposition to the motion of The National Carriers' Conference Committee, as fiduciaries of The Railroad Employees National Health and Welfare Plan and The Railroad Employees National Early Retirement Major Medical Plan (hereinafter "the Railroad Plans"), for leave to serve and file an amicus brief.

3. First, the Court already has been favored with briefs from five sets of parties and from four amicus curiae, covering all of the issues. In particular, the interests of all self-insured plans, and the Railroad Plans specifically, are already represented. Plaintiff The Travelers Insurance Company ("Travelers") acts as fiduciary or otherwise provides administrative services to self-insured plans, including the Railroad Plans. Travelers has specifically lodged its complaint in such capacity. *See* JA-57-63. The additional brief which the Railroad Plans seek to submit is merely cumulative and does not provide the Court with any new positions or perspectives necessary for a full presentation of the issues.

4. More importantly, Intervenor-Appellant Hospital Association of New York State did not consent to the Railroad Plans filing an amicus brief because of the Plans' violation of the Stay Order of the District Court. A copy of our letter on behalf of the Hospital Association is annexed hereto. As the Railroad Plans' April 14, 1993 memorandum of law in support of their motion acknowl-

edges (at p. 3), the Railroad Plans have chosen to defy New York law and have refused to continue paying the 13% differential on hospital charges which is at issue on this appeal. While the court below found that differential preempted by federal law, the court stayed the portion of its Order directed to such 13% differential, pending the outcome of this appeal. *See* JA-1863-69. Accordingly, the 13% differential remains in effect, and the Railroad Plans' refusal to pay it amounts to willful defiance of the Stay Order and/or state law.

5. This circumstance was brought to the attention of the court below, and at a conference on April 15, 1993, Judge Freeh emphasized that the conduct of the Railroad Plans was directly contrary to the intent of the Stay Order. He therefore directed that an Order be submitted that will affirmatively direct all parties to pay the 13%. This proposed order is at present being circulated to all counsel for approval.

6. It is respectfully submitted that the Railroad Plans come before this Court with unclean hands. They have chosen to ignore the District Court's Stay Order and the Public Health Law, resorting to a self-help, but unlawful remedy. Having chosen this path of defiance, they should not be granted "Friend of the Court" status. Accordingly, their motion for leave to file an amicus brief should be denied.

/s/ Jeffrey J. Sherrin

Sworn to before me this 21 day of April, 1993.

/s/ Philip Rosenberg
PHILIP ROSENBERG
Notary Public, State of New York
Qualified in Albany Co. #5006761
Commission Expires 1/11/95